



Statewatch Viewpoint

Secret trilogues and the democratic deficit

Under a new agreement between the Council and the European Parliament the efficiency of decision-making is enhanced at the expense of transparency, openness and accountability

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Introduction

In 2005 the European Parliament got co-decision powers over immigration and asylum measures. However, each of the eight measures adopted in this field were agreed in secret trilogues meetings with the Council and the Commission at “first reading stage”. None of the documents or drafts from the trilogues are officially public.

Much play is made in the discussions on the proposed Reform Treaty that the “third pillar” is to disappear (though the “second pillar” is to be retained) as the European Parliament is to get the power of co-decision in police and judicial measures as well.¹

But if the parliament gets co-decision powers over police and judicial measures as well would the same happen with decision-making removed from public scrutiny?

The European Parliament (referred to as “parliament” hereafter) and the Council of the European Union (the 27 governments) have agreed a revised “Joint Declaration on practical arrangements for the codecision procedure”.

The parliament currently has two different powers over new measures:

a) codecision (under Article 251, TEC) was introduced in the Maastricht Treaty (1993) whereby the Council and parliament have to agree on the adopted text. In the Council qualified majority voting applies. This covers all “first pillar” measures (economic and social) and most immigration and asylum measures (since 2005) and

¹ While “third pillar” decision-making would go (where the parliament was only consulted) there is an inherited legacy of over 700 measures (acquis) adopted since 1976 on which there was little or no democratic input. Moreover, the “special” history of the “third pillar” means that the agencies, bodies and leading role of the Council built up during this period would remain in place - and indeed be enhanced by the creation of the Standing Committee on Internal Security (COSI).

b) consultation where the parliament is asked for an Opinion which is usually ignored (Article 250, TEC). Unanimity in the Council is required. Consultation covers Title VI of the TEU on police and judicial cooperation ("third pillar").

Within the codecision process there are a number of stages. The ultimate stage is where there is no agreement between the Council and the EP and a "Conciliation Committee" is set up. This has equal numbers of Council representatives and MEPs - the Council voting by qualified majority and the parliament by a majority of members.

A Conciliation Committee is only set up after the parliament has gone through a number of stages: committee stages then first and second reading (in plenary sessions).

The Council and the parliament are co-legislators on the basis of a Commission proposal under codecision. First, the parliament adopts its Opinion then the Council adopts a Common Position (having seen the parliament's views) - this is known as "first reading" by both parties. When the Council has adopted its Common Position the parliament can make amendments which the Council can accept or reject in the "second reading".

However, since the Amsterdam Treaty came into effect in 1999 a plethora of informal and semi-formal meetings have taken over from the formal codecision process described above in many instances.

This analysis feature looks at this development and draws on articles by Henry Farrell and Adrienne Heritier (*The invisible transformation of codecision: problems for democratic legitimacy*, 2003) and by Anne Rasmussen and Michael Shackleton (*The scope for action of European Parliament negotiators in the legislative process: lessons of the past and for the future*, 2005). It then looks at the new "Joint Declaration" on codecision between the Council and the parliament.

Codecision and legitimacy

The process is confusing enough for the outsider or interested researcher (let alone the media). This is further complicated as there are *two* different kinds of "trilogues" in the codecision process. The first kind of "trilogue" prepares meetings of the formal Conciliation Committee and takes place between representatives of the Council, Commission and the parliament.

Leading up to the Conciliation Committee the differences on codecision measures at the committee and plenary stages in the parliament are public, as are the debates and the votes, these trilogues remove from public view "compromises" reached in secret meetings between the institutions. These semi-formal trilogues involve the Vice-Presidents, committee chair and rapporteur of the parliament and the Council Presidency and the working party.

Far more insidious is the second form: informal trilogues. These secret meetings try to avoid any meaningful public and open sessions in committee and plenary in the parliament.

They seek to reach an "early agreement" between the Council and the parliament and often lead to "fast track legislation" or "1st reading compromises".

An associated factor - particularly in justice and home affairs matters - is the "unholy alliance" of the two largest groups in the parliament, the PPE (Conservative) and the PSE ("Socialist"). On access to EU documents (2000), privacy in telecommunications (2002), biometric passports (2004) and mandatory data retention (2005) they steam-rolled through the Council's measures.

Farrell and Heritier observe that trilogues to "fast-track" legislation was put in the Amsterdam Treaty at the request of the Council's General Secretariat (its permanent officials). Rasmussen and Shackleton note that prior to the Amsterdam Treaty (coming into effect in 1999) codecision measures could only be concluded at second reading or after the full conciliation procedure - under Amsterdam "it became possible to conclude at first reading".[1]

These trilogues are intended for agreement to be reached before the Council adopts its "Common Position" or the parliament adopts its formal opinion. These "fast-track" trilogues were originally intended, or rather legitimated, as being for non-controversial or highly technical measures - a practice that was soon to extend to highly controversial measures and can now extend to any co-decision measure on the grounds of "efficient" law-making.

The aim of these secret informal trilogues is to reach agreement and by-pass the formal machinery in place on codecision measures. Farrell and Heritier comment:

"Negotiations on early agreement dossiers are almost entirely informal - it is extremely difficult for others within the parliament, let alone outsiders, to have any idea of what exactly is going on... Efficiency is enhanced at the expense of accountability."

The "outsiders" include the media (unless given a tip-off), NGOs, the public and national parliaments (who end up giving their views on the first text which bears little or no relation to what is actually being discussed).

While "outsiders" do not have a clue what is being done in their name the "power brokers" from the two big parties can exercise hidden and often decisive influences on the "compromise" text - and the smaller party groups are marginalised. As Rasmussen and Shackleton note the power of "a small number of influential negotiators" may lead to the parliament losing control of the process. Indeed they say that in practice:

"there is rather little informal control of the work of the key negotiators"

This is because no formal position has been taken by the parliament (or the Council) so:

“all sorts of amendments can be tabled to the Commission proposal by the key negotiators”

and:

“deals are often made with the Council that are very difficult to change in practice”

The parliament committees and plenary sessions (where all party groups and MEPs are represented) are not allowed to change a "dot or comma" of the "compromise" position agreed in informal trilogue meetings. Thus the public processes of proposals, debates, amendments and votes become meaningless. The parliament negotiators are tied in a "deal" to deliver the votes to push through the "deal" agreed in secret.

Farrell and Heritier conclude that codecision was introduced under the Maastricht Treaty (1993) to give the parliament a stronger role and to “bolster the democratic legitimacy of the EU” however, the:

“proliferation of informal meetings and early agreements mean the debate is not as open or transparent as it might be. Important decisions are made in meetings outside the formal legislative process, with little accountability.”

The Guide to Conciliation drawn up by the Conference of Presidents (the leaders of the party groups) in November 2004 set out new procedures. Concerned about the loss of control the Guide says that negotiations should not normally take place until:

“the committee has adopted its first or second reading amendments. This position can then provide a mandate [for negotiations]”

The very obvious "gap" in these Guidelines is where the committee has **not** adopted its "first reading" position and a "fast-track" trilogue results in compromises and amendments agreed in secret which the committee and plenary can simply only say "yes" or "no".

The 1999 and 2007 Joint Declarations

The Joint Declaration between the Council and the parliament in 1999 coincided with the Amsterdam Treaty coming into force - and is quite a bit shorter than the 2007 Joint Declaration. Brief sections cover a Preamble, first reading, second reading and conciliation and the word "trilogue" does not appear.

The two paragraph Preamble simply says that existing practice of "contact" (meetings/trilogues) should continue and that this practice should be "extended to cover all stages of the codecision procedure."

The new 2007 Preamble, termed "General Principles", has ten paragraphs. The most significant are:

- that the institutions cooperate: *"clearing the way, where appropriate, for the adoption of the act at an early stage of the procedure"* (Point 4). The phrase "where appropriate" is unclear and undefined. Is it appropriate to push through a controversial measure "at an early stage" (implying at first reading)?

- "appropriate interinstitutional contacts" (the power-brokers) will monitor the "convergence" of positions "during all stages" (including first reading) (Point 5).

- Point 7 spells out the central role of trilogues:

"Cooperation between the three institutions in the context of codecision often takes the form of tripartite meetings ("trilogues"). This trilogue system has demonstrated its vitality and flexibility increasing significantly the possibilities for agreement at the first or second reading stages, as well as contributing to the preparation of the Conciliation Committee"

Thus the "General Principles" allow secret, trilogues at *all* stages of the codecision process, crucially at first reading.

- trilogues are says the 2007 text:

"conducted in an informal framework. They may be held at all stages of the procedure and at different levels of representation" (Point 8).

In other words if things are not going well the heavy-weights can be brought in to lay down the law.

- "as far as possible draft compromise texts" should be circulated in advance - but do not have to be? (Point 9)

The section on "First Reading" in the 1999 Joint Declaration is very simple. Namely that the institutions should cooperate so that "wherever possible acts can be adopted at first reading" and monitor the progress.

The "General Principles" having set the tone the 2007 text says that if agreement has been reached through "informal negotiations in trilogues" prior to first reading then the Council will send a letter to the chair of the parliamentary committee setting out the agreed amendments:

"the chairman [sic] of COREPER shall forward, in a letter to the chairman of the parliamentary committee, details of the substance of the agreement, in the form of amendments to the Commission proposal. This letter should indicate the Council's willingness to accept the outcome.. should it be confirmed by the vote of the plenary (Point 1.4; the Commission get a carbon-copy)."

Thus the "deal" done in informal, secret trilogue meetings becomes formal and effectively binding on the parliament.

The 1999 Joint Declaration then moves to the procedure at second reading - but the 2006 draft version adds a completely new stage before the second reading, thus extending the "life" of first reading trilogues.

So "contacts" [trilogues] may be continued with a view to concluding an agreement at the common position stage"

To re-cap the Council adopts its "Common Position" after the parliament had adopted its amendments to a proposal in committee and plenary sessions but this is *prior* to the formal start of the second reading procedure.

It is worth noting that Point 6 under the Conciliation committee stage in the 1999 Joint Declaration has been *deleted* in the 2007 text. Point 6 said:

"The outcome of votes and, where appropriate, explanations of vote, taken within each delegation on the Conciliation Committee, shall be forwarded to the Committee."

Even more significant is an addition in Point 14 of the 2007 text. This says:

"The working documents used during the conciliation procedure will be accessible in the Register of each institution once the procedure has been concluded"

This is the only mention in the 2006 draft text of the documents produced being made accessible to the public - **but only after the measure in question had been adopted.**

Moreover, all the documents produced during many trilogues (prior to 1st reading, common position and second reading, and the conciliation committee stage) are termed "informal" meetings and thus are not listed in the public Registers of documents at the time or adoption of a measure.

The European Parliament, codecision and trilogues

The focus here is how codecision, especially first reading informal trilogues deals, affects justice and home affairs issues - immigration and asylum (Title IV, TEC). However, there have been a number of relevant codecision "first pillar" measures like:

- the Regulation on access to EU documents (2001)
- Privacy in telecommunications (2002)
- Mandatory data retention (2005)

All three concerned fundamental issues of access, civil liberties and privacy and were effectively steam-rolled through the parliament with the votes of the "unholy alliance" of the two big parties - the last two were the subject of committee and plenary discussion and contested amendments rather than secret trilogue deals.

Immigration and asylum moved over from "third pillar" decision-making (where parliament is only consulted) to the "first pillar" (codecision) at the beginning of 2005. This timing was itself part of a "dirty deal" as at the end

of 2004 the parliament was being "consulted" on biometric passports (fingerprinting) a measure then "third pillar" but one that would have been "first pillar" with the transfer of Title IV. The parliament was told that if it did not agree to the biometric passports measure in December 2004 then immigration and asylum would not be moved over until May 2005 - the "unholy alliance" of the two big parties ensured the Council's wishes were met.

From 1999 to 2007 the parliament had only been "consulted" on immigration and asylum, meaning in effect it adopted an opinion, sent it over to the Council (to comply with the formal rules) who simply ignored its amendments. Thus many in the parliament argued vehemently that it should have the full powers of codecision so that it could do its job properly - with the implication this would improve measures by protecting the rights and liberties of refugees, asylum-seekers and migrants.

The reality has been somewhat different. Since 2005 eight immigration and asylum measures have been adopted under the codecision procedure - *all of them have been adopted at first reading through secret trilogue meetings.*

These measures are:

- Recommendation on use of short-term visas for researchers (OJ 2005, L 289/23);
- Regulation 2046/2005 on special rules for Turin Winter Olympics;
- Regulation 562/2006 on a code for crossing of borders by persons;
- Regulation 1931/2006 on a regime for local border traffic at external borders;
- Regulation on SIS II (1987/2006);
- Two Decisions on transit via new member states.
- Regulation on the creation of Rapid Border Intervention Teams (euphemistically referred to as "RABITS");

Five out of the eight measures concerned proposals of substance and of concern to citizens and/or the affected groups and could in no sense be seen as uncontroversial.

The Border Code and Local border traffic measures were it is true highly detailed but raised substantial issues of rights and risks. On the Border Code Steve Peers, Professor of law, University of Essex, observed:

"A detailed analysis of the agreed text of the Borders Code shows that the EP had some success in getting a number of its more modest amendments accepted. But more radical changes were either rejected by the Council or not tabled at all by the EP." [2]

There are also a number of proposed measures (either on the table or soon to be):

- Regulation establishing visa Code (COM 403, 2006);
- Directive for returning illegally staying third country nationals;
- Regulation on the Visa Information System (VIS);
- Amendments to the Common Consular Instructions (to meet VIS requirements in countries of origin);
- Decisions on the Returns Fund, Refugee Fund and Borders Fund;
- A proposal on sanctions on the employment of illegally resident people is expected.

It should be noted that the VIS proposal (rapporteur: Sarah Ludford MEP) has been the subject of very lengthy and on-going trilogues. In this case the Council (and Commission) have been less concerned with rushing it through as the VIS computer contract has been delayed. Some important changes have been made in these negotiations - though they still remain officially secret.

Observations

This examination of the codecision procedure involving the Council and the parliament is primarily concerned with the agreements reached in their secret trilogue meetings at first reading stage before the committee (in this case the Committee on Civil Liberties) has adopted its position.

The adoption of the committee position involves the circulation of a draft report from the appointed MEP rapporteur, a first discussion, the putting down of amendments to the draft report from the political groups, and a discussion and vote on the amendments. The amended report represents the parliament's view at first reading stage when it is subsequently, possibly further amended, and adopted by the plenary session. The draft report, the amendments, the discussion on them and the voting is all carried out in public session and available on the parliament's website.

Thus not only can the parliament be publicly "seen" to be doing its job but crucially those in and outside Brussels, right across the EU, can follow the debate and make their view known *prior* to the vote both at committee and plenary stage.

When "deals" are reached in secret trilogue meetings between the Council and the parliament at first reading stage the MEP rapporteur produces a draft report and amendments are submitted but there are no votes on them in committee. The agreed text reached in secret is presented to the committee (and the plenary) as a "done deal". No amendments to the text are allowed, or rather if submitted the rapporteur and their supporters (a majority) are committed to routinely voting them down.

Under the 2007 text for a Joint Declaration this process is further formalised in the form of a letter from the Council (from Coreper, the committee of high-level permanent Brussels-based representatives of all the governments) to the chair of the committee setting out the agreed text.

The 2007 text reflects the Council's love of trilogues with their "vitality and flexibility" and they can comprise "different levels of representation". While "shadow rapporteurs" (from party groups other than that of the rapporteur) can be involved in the initial trilogue meetings when things get tricky the committee chair can be wheeled in as can parliamentary "power-brokers". In decisive discussions the shadow rapporteurs can thus be marginalised especially if they are from the smaller party groups.

By way of example, the trilogues during the adoption of the Regulation on access to EU documents were at first comprised on the parliament side of the rapporteur and shadow rapporteurs. When an impasse was reached the shadow rapporteurs were excluded and parliamentary "brokers" wheeled in to finalise the deal.

What is crystal clear is that the crucial debates, differences and options are sorted out in secret - out of sight of other committee members and absolutely excluding civil society and the public at large.

The process of secret trilogues has led to shoddy trilogue "deals" on a series of crucial civil liberties issues on immigration and asylum. When the parliament gets codecision on police and judicial cooperation under the proposed Reform Treaty will simply see the extension of secret trilogue negotiated first reading deals?

The critical issue for legitimacy is only partly whether we are witnessing a shift in the locus of decision-making in the parliament, from committees to trilogues.

Much more important is the shift of decision-making from a public, accessible, forum to one which is secret and thus removed from public scrutiny, comment, debate and possible intervention. Transparency, open decision making procedures, and openness, access to the documents under discussion, are denied - and if they are denied there can be no accountability.

The uncritical report of the parliament's rapporteur on the new 2007 Joint Declaration (dated 16 April 2007) [3] says that it represents:

"the principles of transparency, accountability and efficiency"

To which the only response can be that this procedure may increase efficiency but it removes transparency and undermines accountability.

The EU has a well-recognised, and still unresolved, "democratic deficit". One reflection of this is the pitiful low turn-out for elections to the

European Parliament.² By the parliament agreeing to the new Joint Declaration, in the name of so-called "inter-institutional loyalty", it can only distance itself further from the people it is meant to represent - especially in areas affecting civil liberties and fundamental rights.

Footnotes

1. Rasmussen and Shackleton says that during the Maastricht era 40% of codecision required the full conciliation process but this dropped to 20% in the following five years.

Similarly the parliament's "Conciliations and Codecision Activity Report" (31 January 2007) observed that between 1 May 1999 and 30 April 2004, 28% of legislative acts were concluded at first reading. During the first half of this legislature "this figure has increased to no less than 63% of dossiers". Moreover, a further 15% were concluded in "early" second reading agreements".

2. Revising EU border control rules: A missed opportunity? Steve Peers:
<http://www.statewatch.org/news/2005/jul/eu-border-code-final.pdf>

3. Final Report of the European Parliament, 16.4.07:
<http://www.statewatch.org/news/2007/sep/ep-co-decision-leinen-report.pdf>

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<http://www.statewatch.org/news/2007/sep/ep-co-decision-final.pdf>

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<http://www.statewatch.org/news/2007/jun/ep-co-decision-rep.pdf>

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² The turnout levels at European elections have fallen from 63% at the first European elections in 1979 to only 46% at the last poll in 2004,